

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEORGE FAY,

Petitioner,

ANSWER

v.

No. 20 Civ. 187 (PAE)(SLC)

ANTHONY J. ANNUCCI, Commissioner,
New York State Department of Corrections
and Community Supervision,

Respondent.

MATTHEW KELLER, an attorney admitted to practice in the State of New York, and before this Court, declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that:

1. I am an Assistant Attorney General, of counsel to Letitia James, the Attorney General of the State of New York. I submit this answer and the accompanying memorandum of law in opposition to the counseled petition for a writ of habeas corpus, filed on January 9, 2020, by George Fay (“petitioner”). Petitioner challenges a 2018 judgment of Supreme Court, New York County (Jackson, J.) convicting him, following a jury trial, of Rape in the First Degree (N.Y. Penal Law §130.35(2)), Criminal Sexual Act in the First Degree (Penal Law §130.50(2)), and Sexual Abuse in the First Degree (Penal Law §130.65(2)), and sentencing him to ten years in prison followed by five years of post-release supervision. In March 2019 the Appellate Division, First Department, unanimously affirmed the conviction. *People v. Fay*, 170 A.D.3d 404 (1st Dep’t), *leave denied*, 34 N.Y.3d 930 (Aug. 20, 2019).

2. By agreement with the New York County District Attorney's Office, the Attorney General of the State of New York will represent respondent. I make the statements in this Answer upon information and belief, based on my review of the records forwarded to the Attorney General's Office by the District Attorney's Office.

3. Respondent, by his attorney, Letitia James, Attorney General of the State of New York, Matthew Keller, Assistant Attorney General, of counsel, answers the petition as follows:

- (a) Admits the allegations in paragraph 1 through paragraph 11, and paragraph 13 through paragraph 17 of the Petition, to the extent petitioner accurately describes the state court procedural history as recited in respondent's memorandum of law;
- (b) Denies the allegations in paragraph 12 of the Petition, and;
- (c) Denies any allegation of the Petition not specifically responded to above.

Defenses

4. As explained in respondent's memorandum of law, the Petition should be denied. Petitioner argues that that his conviction must be reversed on the sole ground that his right to present a defense was "undermined" by the trial court's preclusion of expert testimony.

5. The claim is procedurally barred because the Appellate Division dismissed the claim on firmly established and regularly followed state law grounds independent of the federal question and adequate to support the judgment. *Martinez v. Ryan*, 566 U.S. 1, 9-10 (2012)

6. Petitioner has not alleged the cause and prejudice, or fundamental miscarriage of justice, required to overcome the procedural bar to the claim.

7. Moreover, the claim fails to state a claim upon which habeas relief may be granted. The claim was adjudicated on the merits in State court proceedings and the adjudication of the claim did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1).

8. A separately bound record of petitioner's state court conviction and respondent's supporting memorandum of law are being filed with the Clerk of the Court.

WHEREFORE, and for the reasons set forth in the accompanying memorandum of law, the petition for a writ of habeas corpus should be denied and no certificate of appealability should be issued.

/s/ Matthew Keller
MATTHEW KELLER
Assistant Attorney General
28 Liberty Street
New York, New York 10005
(212) 416-6072

Dated: July 10, 2020
New York, New York

To: Hon. Sarah L. Cave
United States Magistrate Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, New York 10007-1312

Mark M. Baker, Esq. (by ECF)
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DECLARATION OF SERVICE

MATTHEW KELLER, pursuant to 28 U.S.C. § 1746, declares under penalty of perjury as follows: that on July 10, 2020, he served on petitioner respondent's Answer, Memorandum of Law in Opposition to the Petition for a Writ of Habeas Corpus and state court record by electronically filing the same with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following:

Mark M. Baker, Esq.
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767 Third Avenue
New York, New York 10017

/s/ Matthew Keller
MATTHEW KELLER
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Executed on July 10, 2020